THE RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

Doughty v. Sacks
175 Ohio St. 46, 191 N.E.2d 727 (1963)

The defendant, an indigent, was indicted for raping an eight-year old girl. After being found sane he pleaded guilty, and was sentenced to life imprisonment. His motion for leave to appeal was denied by the court of appeals.[1] Thereafter, he sought to invoke the original habeas corpus jurisdiction of the Ohio Supreme Court, alleging, among other grounds, that his constitutional right to counsel had been denied.[2] In a per curiam opinion that court held that not only had the defendant failed to ask that counsel be appointed but that by pleading guilty he had waived his right to counsel.[3] The United States Supreme Court granted certiorari, and in a per curiam opinion vacated the judgment and "remanded for further consideration in light of *Gideon v. Wainwright*," [4] wherein it was held that the sixth amendment's requirement of counsel is made mandatory on the states by the due process clause of the fourteenth amendment.[5] Upon remand the Ohio Supreme Court adhered to its earlier decision. The court apparently assumed that *Gideon* has retrospective effect and that the right to counsel attached to the pleading stage of the criminal proceeding. However the court distinguished *Gideon* from *Doughty* on the ground that Gideon had asked for counsel whereas Doughty had not, and, on that basis alone, denied relief. On a second appeal the United States Supreme Court again reversed per curiam.[6]

The United States Supreme Court has long been troubled by right to counsel and whether or not it is an absolute and unqualified right. In *Powell v. Alabama*,[7] the first case dealing with the right to appointed counsel, the Supreme Court held that counsel must be appointed if the defendant is an indigent accused of a capital offense and incapable of

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[1] State v. Doughty, No. 6452, Franklin County Court of Appeals, May 17, 1960.

[2] Brief for Appellant, pp. 1-5, Doughty v. Sacks, 173 Ohio St. 407, 183 N.E.2d 368 (1962). The defendant also claimed he was beaten by the police, forced to confess, denied a trial by jury, and denied the right to meet his accusers face to face.

[3] Doughty v. Sacks, 173 Ohio St. 407, 183 N.E.2d 368 (1962).

[4] Doughty v. Maxwell, 372 U.S. 781 (1963).

[5] Gideon v. Wainwright, 372 U.S. 335 (1963).

[6] Doughty v. Sacks, 175 Ohio St. 46, 191 N.E.2d 727 (1963), *rev'd sub nom.*, Doughty v. Maxwell, 84 Sup. Ct. 702 (1964). In reversing, the Supreme Court relied on Carnley v. Cochran, 369 U.S. 506 (1962) and Gideon v. Wainwright, *supra* note 5. In *Carnley* the indigent defendant was tried for a non-capital offense. The United States Supreme Court reversed his conviction because counsel had not been either offered to, or intelligently waived by the defendant. The Court said that "presuming waiver from a silent record is impermissible."

[7] 287 U.S. 45 (1932).

adequately defending himself. In the subsequent case of *Betts v. Brady* [8] the defendant was indicted for a non-capital felony. At the arraignment his request for court appointed counsel was denied because it was the state court's practice to appoint counsel only in murder and rape prosecutions. He then pleaded not guilty and conducted his own defense. Following his conviction and a denial of a writ of habeas corpus, the United States Supreme Court granted certiorari and affirmed, reasoning that the fourteenth amendment did not make the sixth amendment applicable to the states. In a state trial, counsel need be present only where an "appraisal of the totality of facts in a given case" clearly shows a denial of fundamental fairness induced by counsel's absence.[9] And on the facts of this case, the court concluded that such a denial did not exist. Then in 1963, the Supreme Court decided *Gideon v. Wainwright* [10] which was factually similar to *Betts v. Brady*. In *Gideon,* the petitioner was charged with the felony of breaking and entering with intent to commit a misdemeanor. He appeared before the court without counsel and his request for appointment of counsel by the court was denied. After attempting to conduct his own defense, he was convicted and sentenced to five years in the state penitentiary. Gideon's subsequent application for a writ of habeas corpus was denied by the Florida Supreme Court in a per curiam opinion presumably relying on *Betts v. Brady*.[11] The United States Supreme Court, in overruling *Betts* and reversing *Gideon,* pointed out that at the time *Betts* was decided, numerous precedents supported the conclusion that the appointment of counsel was essential to a fair trial.[12] The court then expressly

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[8] 316 U.S. 455 (1942).

[9] *Id.* at 462.

[10] *Supra* note 5.

[11] Gideon v. Cochran, 135 So. 2d 746 (Fla. 1961).

[12] 372 U.S. 335, 344: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trial in some countries but it is in ours."

The surprising aspect of *Gideon* is that the mandate was so long in coming. For a prelude, see Chandler v. Fretag, 348 U.S. 3 (1954); Wade v. Mayo, 334 U.S. 672 (1948); William v. Kaiser, 323 U.S. 471 (1945); Tinkle v. United States, 254 F.2d 23 (8th Cir. 1958).

See generally Annot., 2 L. Ed. 2d 164 (1957); Holtzoff, "The Right of Counsel Under the Sixth Amendment," 20 N.Y.U.L. Rev. 1 (1944); Fellman, The Defendant's Rights 112-127 (1958).

> *Gideon* is noted in 2 De Paul L. Rev. 306, 307-08 (1963) in these terms: One can surmise that the main import of *Gideon v. Wainwright* will be to the effect of expanding the meaning of the due process clause of the fourteenth amendment to include the fundamental propriety of the right to counsel. Therefore the fourteenth amendment now guarantees to the defendants in state criminal proceedings the identical and fundamental justice of the right to counsel which the sixth amendment has always guaranteed in federal prosecutions and in neither case will there be a distinction made between capital and non-capital offenses.

Gideon is also noted in 37 St. John's L. Rev. 358 (1963) and 49 A.B.A.J. 587 (1963). For a prediction of this outcome see Kamisar, "The Right to Counsel and the

held that the sixth amendment's requirement of appointment of counsel is incorporated into the fourteenth amendment's due process clause, and is therefore applicable to proceedings in state courts.[13]

In *Gideon,* the court emphasized that procedural safeguards must be taken to assure all defendants equal treatment before the courts. Thus a giant step forward has been taken toward equalization of defendant's rights; yet with this advancement has come more than the usual number of ancillary problems.

As stated by Mr. Justice Clark, "The sixty-four dollar question is at what point in the procedure is an indigent entitled to the assignment of counsel?" [14] At the trial, the right to counsel appears to be a settled question and clearly attaches as an absolute right.[15] At the appellate level, right to appointment of counsel was at one time held to be within the court's discretion and not an absolute, unqualified right.[16] However, in 1963 the Supreme Court in *Douglas v. California* [17] held that where an indigent has only one appeal as of right, the state must provide him with the assistance of counsel.[18] The court expressly left open the question of whether counsel is required for the preparation of a petition for dis-

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Fourteenth Amendment: A Dialogue of the Most Pervasive Right of an Accused," 30 U. Chi. L. Rev. 1 (1962). For the historical background of right to counsel culminating in the overruling of Betts v. Brady, see Angell, "The Burial of Betts v. Brady," 18 Record of N.Y.C.B.A. 265 (1963).

[13] The sixth amendment's requirement of assistance of counsel had previously been interpreted to include the right to court-appointed counsel. Bute v. Illinois, 333 U.S. 640 (1948).

[14] Clark, "The Sixth Amendment and The Law of the Land," 81 St. Louis U.L.J. 1, 10 (1963).

[15] Chewning v. Cunningham, 368 U.S. 433 (1961); *In re* Groban, 352 U.S. 330 (1957). In Evans v. Rives, 126 F.2d 633, 641 (D.C. Cir. 1942), the court said, "the duty upon a court of according an accused his constitutional right to assistance of counsel is positive and affirmative and must not be ignored." See Annot., 2 L. Ed. 2d 1644 (1957); 23 C.J.S. *Criminal Law* §§ 980-982(2) (1961); 24 C.J.S. *Criminal Law* § 1574 (1961).

The right has not been recognized in the following circumstances on the belief that there was no "trial": Anonymous v. Baker, 360 U.S. 287 (1959) (secret investigation); Begalke v. United States, 286 F.2d 606 (Ct. Cl. 1960) (police interrogation); Gilmore v. United States, 129 F.2d 199 (10th Cir.), *cert. denied,* 317 U.S. 631 (1942) (grand jury witness); *Ex parte* Benton, 63 F. Supp. 808 (N.D. Calif. 1945) (armed forces criminal prosecution); People v. Coker, 104 Cal. App. 2d 224, 231 P.2d 81, *cert. denied,* 342 U.S. 894 (1951) (coroner's inquest); State v. Andrews, 187 Kan. 458, 357 P.2d 739, *cert. denied,* 368 U.S. 868 (1961) (lunacy inquisition); Commonwealth v. Novak, 395 Pa. 199, 150 A.2d 102 (1959) *cert. denied,* 361 U.S. 882 (1960) (sanity commission hearing).

[16] See Bandy v. United States, 272 F.2d 705 (8th Cir. 1959); Armstrong v. Bannan, 272 F.2d 577 (6th Cir. 1959), *cert. denied,* 362 U.S. 925 (1960); California v. Logan, 137 Cal. App. 2d 331, 290 P.2d 11 (1955); People v. Pitts, 6 N.Y.2d 288, 160 N.E.2d 523, 189 N.Y.S.2d 650 (1959). See Annot., 55 A.L.R.2d 1072 (1957).

[17] 372 U.S. 353 (1963).

[18] *Id.* at 357.

cretionary or mandatory review beyond the first appeal. On the same day the Supreme Court also decided *Lane v. Brown.*[19] Here the defendant was convicted of murder and sentenced to death. The Public Defender represented him on an unsuccessful appeal and also at a hearing on a writ of error coram nobis. The Public Defender refused to appeal from the denial of the writ. The United States Supreme Court in reversing said a state cannot deprive an indigent of appellate review solely because of his poverty. This case appears to extend the requirement of appointed counsel for indigents on appeal, but exactly how far appointed counsel need pursue further relief is not yet clear.

The judicial delineation of the right to counsel at the pretrial stages is far from complete. One who is merely "picked up," arrested, and interrogated does not have an absolute right to counsel,[20] but the absence of counsel will be a factor in determining whether a confession was properly and voluntarily given.[21]

At the preliminary hearing or examination there is a qualified but not an absolute right to counsel. In *White v. Maryland,*[22] the defendant, without counsel at his preliminary hearing, pleaded guilty. At the later arraignment, he was represented by counsel and he pleaded not guilty. However, his original guilty plea was admitted into evidence at the trial,[23] and he was convicted. In reversing the conviction, the Court held that in this instance the preliminary hearing was a "critical stage" [24] in the trial and that the fourteenth amendment's due process clause required representation by counsel. The Court approved the following language of *Hamilton v. Alabama*:[25] "Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead in-

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[19] 372 U.S. 477 (1963).

[20] See Cicenia v. LaGay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958); Feguer v. United States, 302 F.2d 214 (8th Cir. 1962); State v. Andrews, *supra* note 15; Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949); Commonwealth *ex rel* Johnson v. Meyers, 194 Pa. Super. 452, 169 A.2d 319, *cert. denied,* 368 U.S. 960 (1961). *But see* Escobedo v. Illinois, 84 Sup. Ct. 1758 (1964). See generally Barrett, Police Practices and the Law—From Arrest to Release or Charge (1962); Houts, From Arrest to Release (1958).

[21] See, *e.g.,* Mallory v. United States, 354 U.S. 449 (1957); Lee v. United States, 322 F.2d 770 (5th Cir. 1963). See Beaney, "Right to Counsel Before Arraignment," 45 Minn. L. Rev. 771 (1961).

[22] 373 U.S. 59 (1963).

[23] Under Ohio law a guilty plea taken at the preliminary examination may also be introduced as evidence at the trial. See Ohio Rev. Code Ann. § 2937 (Page 1953).

[24] What is a critical stage is to be determined on a case-by-case basis. See Clark, *supra* note 14, at 10-11. In Hamilton v. Alabama, 368 U.S. 52 (1961) the court said the arraignment was a critical stage because there the defense of insanity and other objections either had to be raised or they were lost. In White v. Maryland, *supra* note 22, the Court said that the preliminary hearing under Maryland law was as critical a stage as the arraignment under Alabama law, and that a taking of a plea in the absence of counsel violates due process requirements.

[25] *Supra* note 24.

telligently." [26] The proposition that there must be a showing of prejudice for a reversal was explicitly rejected. Although the case involved a capital offense, the language of the opinion implies that in any serious non-capital offense, the Court will reach the same result.[27] *Nance v. United States* [28] illustrates what may happen when counsel is not granted at the preliminary hearing. There the accused asked a witness: "How do you know it was me, when I had a handkerchief over my face?" This was held to have been properly admitted into evidence as an admission.

After the indictment, but prior to the arraignment, there may be no absolute right but the absence of counsel will be a strong factor in judging what took place, even to the point of excluding voluntary confessions.[29] The decision in *Lee v. United States* [30] extended this protection further. After being indicted for selling heroin, Lee was secretly questioned in his cell while without counsel. The Government agents then testified to his oral admissions. The Court in reversing Lee's conviction said that "the constitution gives a defendant the absolute right to counsel starting no later than after the indictment." [31]

If the defendant at the arraignment, and in the absence of counsel pleads not guilty, and there is not even a suggestion that the absence of counsel was harmful, it appears that the court will not reverse a conviction for lack of counsel.[32] But if there were even a trace of harm resulting from counsel's absence the court might well reach the conclusion that counsel was necessary and accordingly reverse. That trace of harm might be the waiver of a defense or objection that is required to be raised at the arraignment. It could be the waiver of a defense such as insanity, or the failure to object to the introduction of evidence. However, if the defendant in the absence of counsel pleads guilty the procedure becomes

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[26] Hamilton v. Alabama, 368 U.S. 52, 55.

[27] The situation is clearly analogous to the early distinction that was made between capital and non-capital offenses and right to counsel at the trial. This distinction was soon removed. Now that the right to counsel has been extended to the arraignment for capital offenses where the court considers the arraignment to be a critical stage, the logical extension is to take the next step and grant the right to defendants charged at the arraignment with serious non-capital offenses.

[28] 299 F.2d 122 (D.C. Cir. 1962).

[29] Spano v. New York, 360 U.S. 315 (1959). While the court excluded the confession, it refused to say whether there was an absolute right to counsel at this point.

[30] *Supra* note 21.

[31] Lee v. United States, 322 F.2d 770, 778. The breadth and inclusiveness of the holding in Massiah v. United States, 377 U.S. 201 (1964), is still amenable to question. Mr. Justice Stewart's opinion at its broadest held that the sixth amendment required exclusion of evidence "which federal agents had deliberately elicited from [defendant] after he had been indicted and in the absence of his counsel," but elements of unfair surprise present in *Massiah* and absent in cases like *Lee* might reasonably lead to different results in the run of cases.

[32] Carnley v. Cochran, 369 U.S. 506 (1962). *But see* Mr. Justice Black's concurring opinion at 518-19. See also Hamilton v. Alabama, *supra* note 26; Gallagos v. Nebraska, 342 U.S. 55 (1951); Foster v. Illinois, 332 U.S. 134 (1947).

more in doubt and the chances of a reversal of a conviction greater. Surely the presence of counsel at the arraignment may be as important as having counsel at the trial.[33] The decisions made at this stage determine the course of the criminal prosecution. Decisions which may result in an unfounded conviction should not be made by a bewildered defendant but should be left to the expert judgment of an attorney. One hypothetical case illustrates the importance of an attorney. If a defendant is charged with rape, counsel may know that the victim was known to be unchaste, or that she made no fresh complaint, or that there was an illegal search, or that the confession was obtained by force, or that, although the prosecutor could prove a lesser offense, he could not prove the offense charged. Counsel in this situation could either negotiate a guilty plea for a lesser penalty or advise a plea of not guilty. Doughty in the instant case was imprisoned for life at hard labor after his guilty plea at the arraignment ended the criminal proceedings. Representation by counsel seems at least as critical in the instant case as in *White* where the plea was only used as evidence at the trial.

Once it is determined that a constitutional right exists, may that right be waived? The constitutional right[34] to a speedy and public trial, the right to a trial by jury, and the right to confront adverse witnesses may all be waived.[35] It has also been held that the right to counsel may be waived.[36] However, the waiver of right to counsel must be made knowingly and intelligently;[37] it must be made with knowledge of the right and it will

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[33] In Downing, "Criminal Procedure—Right to Counsel Prior to Trial," 44 Ky. L.J. 103 (1955) the author argues at 103 that:

> If at any time from the time of his arrest to final determination of his guilt or innocence, an accused really needs the help of an attorney it is the pretrial period. Even if the defendant has committed some crime, he may not be guilty of the crime with which he had been charged, and in ignorance of the law he may on arraignment, even plead guilty to a more serious offense than he has actually committed.

[34] U.S. Const. amend. VI.

[35] *Speedy Trial*: United States v. Lustman, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958); Taylor v. United States, 238 F.2d 259 (D. C. Cir. 1956) (court recognized the rule but held the defendant did not waive his right by failing to ask for it when he was not aware of that right); Campodonico v. United States, 222 F.2d 310 (9th Cir.), *cert. denied*, 350 U.S. 831 (1955). *Public trial*: United States v. Kobli, 172 F.2d 919 (3d Cir. 1949). *Trial by Jury*: Aeby v. United States, 255 F.2d 847 (5th Cir. 1958); Leonard v. United States, 231 F.2d 588 (5th Cir. 1956). *Confrontation of Adverse Witnesses*: Cruzado v. Puerto Rico, 210 F.2d 789 (1st Cir. 1954).

[36] Walker v. Johnston, 312 U.S. 275 (1941); Cuff v. United States, 311 F.2d 185 (5th Cir. 1962); Devine v. Hand, 287 F.2d 687 (10th Cir. 1961); McDonald v. Hudspecth, 108 F.2d 943 (10th Cir. 1940). See also Fellman, The Defendant's Rights 119-21 (1958).

[37] Carnley v. Cochran, supra note 32; Moore v. Michigan, 355 U.S. 155 (1957); Von Moltke v. Gillies, 332 U.S. 708 (1947); Johnson v. Zerbst, 304 U.S. 458 (1938); Fee v. United States, 207 F. Supp. 674 (W.D. Va. 1962); Arellanes v. United States, 302 F.2d (9th Cir. 1962); Aiken v. United States, 296 F.2d 604 (4th Cir. 1961).

never be presumed or implied.[38] A failure to inform an accused of his right to counsel,[39] and if an indigent, of his right to court-appointed counsel, has been held to preclude an intelligent waiver of that right where the defendant does not know that the right exists.[40] A plea of guilty by itself does not waive the constitutional right to counsel or court-appointed counsel if the defendant is an indigent.[41] An Ohio court has held that a failure to inform an indigent defendant of his constitutional right to counsel before he enters a guilty plea violates the fourteenth amendment.[42] However, in the instant case, the Ohio Supreme Court on the first remand adhered to its prior decision and tersely dismissed stating that "the facts in the *Gideon* case are completely different from those in the present case," [43] thereby impliedly holding that when the defendant entered a guilty plea he was presumed to have waived his right to counsel.[44] The Ohio court has

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[38] In Patton v. North Carolina, 315 F.2d 643 (4th Cir. 1963), the court relied on Johnson v. Zerbst, 304 U.S. 458 (1938), when it said that courts indulge in every reasonable presumption against waiver of right to counsel. The court further stated that an effective waiver of counsel cannot be implied. See also Carnley v. Cochran, *supra* note 32, and Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942).

[39] In Pennsylvania *ex rel* Herman v. Claudy, 350 U.S. 116, 122 (1956) the court said:

> Moreover the number and complexity of the charges against petitioner, as well as their seriousness, create a strong conviction that no layman could have understood the accusations and that petitioner should, therefore, have been advised of his right to be represented by counsel.

See Annot., 3 A.L.R.2d 1003 (1949); 23 C.J.S. *Criminal Law* § 979(2) (1961). The Ohio decisions of *In re* Motz, 100 Ohio App. 296, 136 N.E.2d 430 (1955), and State v. Cartwright, 81 Ohio L. Abs. 226, 161 N.E.2d 456 (Ct. App. 1957), seem to impose the duty on the magistrate before whom an accused is brought for preliminary hearing to inform the accused of his right to counsel.

[40] Gibbs v. Burke, 337 U.S. 773 (1949); Uveges v. Pennsylvania, 335 U.S. 437 (1948); United States v. Nickerson, 124 F. Supp. 35 (D. Mass. 1954). See Beaney, The Right to Counsel 94-109 (1955).

[41] Rice v. Olson, 324 U.S. 786 (1945); Commonwealth v. Kadio, 179 Pa. 196, 115 A.2d 777 (1955). See Annot., 149 A.L.R. 1403-16 (1944); Beaney, The Right to Counsel 64-66 (1955).

[42] Ohio v. Porcaro, 102 Ohio App. 128, 141 N.E.2d 482 (1956). Here the defendant was charged with burglary and grand larceny. The court seems to have anticipated the *Gideon* decision when it stated in syllabus 4:

> Where the defendant has been indicted for a felony, and upon arraignment he enters a plea of guilty without the benefit of counsel, and before the defendant has entered such plea the trial court has not advised him of his constitutional rights, the accused is not accorded due process under the fifth and fourteenth amendments to the federal constitution.

Id. at 128-9, 141 N.E.2d at 484. See also *In re* Motz, *supra* note 39; State v. Stewart, 38 Ohio L. Abs. 543, 50 N.E.2d 910 (Ct. App. 1943). In Annot., 3 A.L.R.2d 1003, 1042 (1949), Brooks v. State, 17 Ohio App. 510 (1923), is cited in these terms: "the effect of this decision . . . is that it is made obligatory upon the trial court to initiate inquiry into the accused's ability to employ counsel and to inform him of his right to have counsel appointed."

[43] *Supra* note 6, at 46, 191 N.E.2d at 728.

[44] *Supra* note 3.

consistently held that a guilty plea raises a presumption of waiver of the right to have counsel appointed,[45] a presumption that has yet to be overcome in any case before it,[46] despite the fact that one who intends to plead guilty may be in greater need of counsel than one who does not so intend.[47]

The defendant, Doughty, was a semi-skilled, indigent laborer with a fourth grade education. He alleged that he was not specifically informed of the crime to which he was pleading, of the severity of the punishment, or of his right to counsel.[48] On these facts it is difficult to argue that there was a known and intelligent waiver of his right to counsel.

The Ohio Supreme Court distinguished *Doughty* from *Gideon* on the sole point that "in *Gideon* the accused specifically asked that counsel be appointed to represent him, which request was denied," whereas in *Doughty* the accused "never made any request to the court that counsel be appointed to represent him." [49] The court is seemingly distinguishing between active and passive denial of counsel; nevertheless, it would seem that where an uneducated indigent is not informed by the court of his federal and state constitutional [50] and statutory [51] right to counsel, he should not be deemed to have waived that right through his own ignorance.[52]

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[45] *In re* Levenson, 154 Ohio St. 278, 96 N.E.2d 760 (1950); *In re* Burson, 152 Ohio St. 375, 89 N.E.2d 651 (1949). This presumption apparently arose in the *Burson* case. There the court made it clear that the trial court erred when it did not inform the defendant of his right to counsel. However after looking at the record, the Ohio Supreme Court concluded that the trial court could, on the facts presented, presume the defendant knew he had no defense. The court also relied on Betts v. Brady, 316 U.S. 455 (1942), saying that that case does not require that all defendants have the assistance of counsel in all cases and that under the circumstances presented counsel was not required. This reasoning should now be reconsidered and rejected in the light of the overruling of Betts v. Brady by *Gideon*.

[46] The burden of proof has been shifted to the defendant to prove he was harmed by the denial of counsel. Research has failed to disclose any case in which this presumption has been overcome.

[47] In Kamisar, *supra* note 12, at 63, the author argues that "the defense attorney afforded access to the prosecutor's files can much more intelligently weigh the likelihood of conviction against the results he can achieve by a guilty plea. How well informed is the uncounselled indigent when he makes his decision to plead guilty or stand trial?"

[48] Brief for Appellant, *supra* note 2, pp. 1-5.

[49] *Supra* note 6, at 47, 191 N.E.2d at 728.

[50] The relevant constitutional provisions are: U.S. Const. amend. VI; U.S. Const. amend. XIV; Ohio Const. art. I, § 10.

[51] The relevant statutory provisions are: Fed. R. Crim. P. 44; Ohio Rev. Code Ann. § 2941.50 (Page 1953) A clearer and more concise statute appears in Cal. Pen. Code § 987:

> If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the courts must assign counsel to defend him.

[52] See cases cited note 37 *supra*. In State v. Cartwright, 81 Ohio L. Abs. 226, 228, 161 N.E.2d 456, 457 (Ct. App. 1957) the court stated:

> [E]ven in a case where guilt may seem apparent, it is the positive duty of the court to explain carefully to the accused all his legal and constitutional

Another ground used by the Ohio Supreme Court to deny relief in its first decision was that habeas corpus was an improper remedy because the court below had jurisdiction and the writ of habeas corpus may be allowed only where there is a lack of jurisdiction.[53] The length of this note allows but a brief comment on this significant subject. It would seem that federal precedents will control the right to counsel cases arising in state courts.[54] However, that question has not yet been explicitly decided. The Supreme Court of the United States has uniformly held that granting the right to counsel is a prerequisite to the jurisdiction of the court, that a decision is void if that right is denied,[55] and that the proper method of attacking such a judgment is by a writ of habeas corpus.[56] When the Ohio Supreme Court defines jurisdiction in criminal cases by mechanical standards so effectively denying important constitutionally protected rights, it errs in its duty to preserve those rights.[57] The court should be especially

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rights, including especially his right to representation by counsel both before arraignment and at all subsequent stages of the case, to inquire as to defendant's wishes with respect to counsel and, if so requested, and if he finds defendant indigent, to appoint counsel for him.

[53] Chapter 2725 of the Ohio Revised Code governs the granting of writs of habeas corpus. Section 2725.02 provides that the writ may be issued by the Supreme Court, Court of Appeals, Court of Common Pleas and the Probate Court. Note that not only is the Supreme Court of Ohio, along with the lower courts, authorized to grant writs of habeas corpus, but it is also given original jurisdiction in habeas corpus proceedings by article IV, § 2 of the Ohio Constitution.

[54] Ker v. California, 374 U.S. 23 (1963). For a valuable discussion of this aspect of *Doughty* see Note, 31 U. Chi. L. Rev. 591, 596 (1964).

[55] Von Moltke v. Gillies, *supra* note 37; Johnson v. Zerbst, *supra* note 37; Dooling v. Overholser, 243 F.2d 825 (D.C. Cir. 1957); United States v. Morgan, 222 F.2d 673 (2d Cir. 1955).

[56] In Johnson v. Zerbst, *supra* note 37, at 468, the court said:

> If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.

See also Able v. Tinsley, 213 F. Supp. 784 (D. Colo. 1962); Devine v. Hand, *supra* note 36; Annot., 146 A.L.R. 369 (1943); 25 Am. Jur. *Habeas Corpus* § 49 (1940); Fellman, The Defendant's Rights 64-84 (1958).

[57] Habeas corpus has been denied in the following decisions: Rodriguez v. Sacks, 173 Ohio St. 456, 184 N.E.2d 93 (1962) (allegation of lack of competent counsel); Boynton v. Sacks, 173 Ohio St. 526, 184 N.E.2d 337 (1962) (allegation defendant was held incommunicado for twenty-two days); Norton v. Green, 173 Ohio St. 531, 184 N.E.2d 401 (1962) (allegation of improper indictment); Abney v. Sacks, 172 Ohio St. 401, 176 N.E.2d 223 (1961) (claim of incompetent counsel).

In the following cases the court has recognized the rule that denial of right of counsel precludes a valid judgment, yet held that the facts did not warrant the rule's application: *In re* Beard, 164 Ohio St. 488, 132 N.E.2d 96 (1956); *In re* Levenson, *supra* note 45; *In re* Burson, *supra* note 45. The practical effect of these decisions

responsible in cases similar to *Doughty* where the deprivation of the defendant's liberties is so severe.

The consequences of reversal by the United States Supreme Court for failure to appoint counsel to represent Doughty must be examined.[58] When Gideon's writ was allowed by the Supreme Court, there was a fantastic increase in the number of such writs filed in Florida. "Of the 8,000 prisoners in Florida penal institutions, 4,542 were convicted without benefit of counsel. Already more than 3,000 have petitioned for review of their conviction." [59] It should be obvious that the problem of judicial administration is quite serious. It would be especially serious for the Ohio Supreme Court because the state constitution states that the supreme court shall have original jurisdiction of writs of habeas corpus.[60] And it is certain that regardless of how these writs reach the court the resulting number of writs filed would preclude anything but a hasty evaluation of their merits and would deter the court from its other important duties. In fact, the court has been "literally flooded with such writs" [61] since *Gideon* and *Doughty* were considered by the Supreme Court. The court's harsh attitude toward these writs and its overly strict interpretation of "jurisdictional error" may have been in part motivated by a reluctance to encourage the filing of prodigious numbers of writs. A constitutional amendment to eliminate this direct procedure is imperative, since the court should not be forced to the dilemma of either devoting a disproportionate amount of time to habeas corpus writs or continuing dubious judicial definitions to quell the onslaught. Economy of judicial administration is a poor rationale for the abrogation of such a fundamental constitutional right as right to counsel.

The Supreme Court of the United States has concluded that failure to offer counsel in criminal prosecutions will result in such fundamental unfairness and lack of justice as to be in and of itself, a violation of the constitution:

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is that there is no right to an original habeas corpus action in the Supreme Court of Ohio in the overwhelming majority of cases. See Note, 21 Ohio St. L.J. 684 (1960).

58 Petitioner's motion to the Supreme Court in the instant case asked that the warden be ordered to discharge him from custody. His freedom may be short lived since he may be tried again without being subjected to double jeopardy. Green v. United States, 355 U.S. 184 (1957); Wiman v. Powell, 293 F.2d 605 (5th Cir. 1961).

59 Time, Oct. 18, 1963, p. 53.

60 Ohio Const. art. IV, § 2.

61 Harold S. Shelton, Deputy-Clerk of the Ohio Supreme Court, told the writer on November 22, 1963 that there had been a "substantial increase in the number of habeas corpus writs filed in the Ohio Supreme Court this year as compared to the past. We have been literally flooded with such writs."

It is interesting to note that from March 18, 1963 (the date of the Supreme Court's decision in *Gideon*) to November 22, 1963, there had been thirty-two habeas corpus writs filed in the Ohio Supreme Court. During that same period of time twenty-seven writs were filed in the Common Pleas Court of Franklin County.

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person hailed into court who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.[62]

If this language is to be literally applied, it would seem that in each and every criminal case counsel would have to be provided if the defendant were indigent and counsel was not properly waived. Such a result would surely create much confusion since the majority of the states have refused to appoint counsel in misdemeanor prosecutions.[63] A proper result would be to make appointment of counsel necessary only in criminal prosecutions deemed to be of "serious nature." [64]

One possible solution for the similar predicaments of this and other courts is to apply constitutional decisions only prospectively. The Supreme Court has not yet expressly said whether *Gideon* is to be applied prospectively or retrospectively.[65] A rationale for prospective overruling exists for those cases initially correctly decided. One may argue that only because of changed circumstances have they become invalid and that to reopen them would be doing a great misdeed. But there has been a semblance of a general rule that constitutional decisions are to be applied retrospectively except where such an application would result in hardship or injustice.[66] Mr. Justice Clark has said that since we are dealing with a

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[62] Gideon v. Wainwright, *supra* note 5, at 344.

[63] See Simeone & Richardson, "The Indigent and His Right to Legal Assistance in Criminal Cases," 81 St. Louis U.L.J. 15, 20 (1963).

[64] "Serious nature" criminal cases appears to mean something more than a traffic ticket yet less than a felony. Where the line will be drawn requires a case by case analysis furthered by the application of common sense. Certainly the crime, the applicable punishment, and the particular defendant are all factors to consider. Interpreting some cases to be "criminal prosecutions" and others not to be, however, would seem to be a dubious solution to the problem.

Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942) has been the only federal case to consider the right to counsel in a misdemeanor prosecution. The court in the non-support action said at 638 that the constitution did not distinguish between serious and minor offenses and the subsequent right to counsel.

However, the Supreme Court, in District of Columbia v. Clawens, 300 U.S. 617, 624-25 (1937), termed an offense punishable by 90 days imprisonment a petty offense and one not entitled to a trial by jury.

[65] The question merits full consideration and adequate exegesis by the court, but will apparently be resolved in favor of retrospective application *sub silentio*. United States v. LaValle, 330 F.2d 303, *cert. denied*, 84 Sup. Ct. 1921 (1964).

[66] See, *e.g.*, Safarif v. Udall, 304 F.2d 944 (D.C. Cir. 1962); Massaghlia v. Commissioner, 286 F.2d 258 (10th Cir. 1961). This general law has shown a rather remarkable degree of variance in its application to the cases. An example would be the turmoil that followed the Supreme Court decision in Mapp v. Ohio, 367 U.S. 643 (1961), which overruled prior case law allowing the introduction into state courts of illegally obtained information. Lower courts have split on whether the opinion stood for both prospective and retrospective application or prospective applica-

constitutional rule, it may well be that "the question would be governed by our opinions holding that the right of an indigent to a sufficiently full record of the proceedings is retrospective." [67] The proper solution to all of this is surely the obvious: a straight-forward holding by the Supreme Court on the question whether *Gideon* invalidated prior convictions wherein an indigent defendant was denied court-appointed counsel. At least one of the Justices believes the time is ripe for that decision.[68]

By restricting habeas corpus writs, by not requiring magistrates to inquire whether defendants want, need, or can afford counsel, and by allowing waiver of the right to counsel to be presumed, the Ohio Supreme Court has abdicated its responsibility to protect constitutional rights.

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tion alone. See Traynor, "Mapp v. Ohio at Large in the Fifty States," 1962 Duke L. J. 319, 338-42.

A. For prospective application only, see Hall v. Warden, 201 F. Supp. 639 (D. Md. 1962), *rev'd* 313 F.2d 483 (4th Cir. 1963); Moore v. State, 41 Ala. App. 657, 146 So. 2d 734 (1962); People v. Miller, 11 N.Y.2d 154, 182 N.E.2d 99, 227 N.Y.S.2d 421 (1962). See also Bender, "The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio," 110 U. Pa. L. Rev. 650 (1962).

B. For prospective and retrospective application, see Hurst v. California, 211 F. Supp. 387 (N.D. Calif. 1962). At 395 the court held that *Mapp* must be given retroactive effect:

> It would appear that the Supreme Court itself has at least intimated that such is to be the result of any decision in which the court reverses the pre-existing law on constitutional grounds. Griffin v. Illinois, 351 U.S. 12 (1955); Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958).

For the Supreme Court's reasoning, see Mr. Justice Frankfurter's concurring opinion in Griffith v. Illinois, *supra*, at 25-26.

C. For indecision see State v. Evans, 75 N.J. Super., 319, 324, 183 A.2d 137, 140 (1962):

> While the application of Mapp is essentially prospective it is not necessarily inapplicable merely because the search antedated [it]. . . its restrospective effect, however, is circumscribed by potential limits and is subordinate to essential justice both to the individual and to the community.

An unambiguous statement by the Supreme Court would prevent this from occurring. See generally Snyder, "Retrospective Operation of Overruling Decisions," 35 Ill. L. Rev. 121 (1941).

[67] Clark, "The Sixth Amendment and The Law of the Land," *supra* note 14, at 9. For support Justice Clark cites Ker v. California, *supra* note 54, and Nowell v. Illinois, 373 U.S. 420 (1963).

[68] Mr. Justice Harlan in dissenting from the court's decision to remand Pickelsimer v. Wainwright, 375 U.S. 2, 3-4 (1963), for further consideration in light of Gideon v. Wainwright said:

> I am unable to agree with the Court's summary disposition of these 10 Florida cases, and believe that the federal question . . . whether the denial of an indigent defendant's right to court-appointed counsel in a state criminal trial as established last Term in Gideon v. Wainwright . . . invalidates his pre-*Gideon* conviction [ought to be given full consideration].
>
> In the current swift pace of constitutional change, the time has come for this Court to deal definitively with this important and far-reaching subject.

Injured defendants must thus resort to the federal court system where the administrative problems are surely as great as in the state courts. The Ohio Supreme Court could alleviate the problem by placing the burden of protecting these rights on the trial courts of the state, where it properly belongs.

From *Powell v. Alabama* to *Gideon v. Wainwright,* the doctrine of right to counsel has been expounded and illuminated.[69] *Doughty* was clearly inconsistent with this mandate and was correctly reversed by the United States Supreme Court, for as we have seen, "without the help of a lawyer, all the other safeguards of a fair trial may be empty." [70]

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[69] For a discussion of *Powell* through *Betts* and other similar cases, see 2 Ploscowe, Manual for Prosecuting Attorneys 622-28 (1956).

[70] Brennan, "The Bill of Rights and the States," 36 N.Y.U.L. Rev. 761 (1961). At pp. 773-74 Mr. Justice Brennan went on to say:

> And it is not the due process clause that is alone involved here. The equal protection clause of the Fourteenth Amendment is also implicated. For a state cannot, consistently with the Federal Constitution, deny a citizen accused of crime the right to the assistance of counsel if he cannot afford to pay his own lawyer. The victims of the limitation upon the state's obligation to provide counsel are the indigent—they are the helpless, the weak, the outnumbered in our society. . . . The denial of counsel to an indigent accused seems almost to be an a fortiori case of the violation of the guarantee of equal protection of the laws.